IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977
NO. 77-1632

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, HELPERS AND WAREHOUSEMEN OF AMERICA,

Petitioner,

-against-

THE BOHACK CORPORATION,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PRELIMINARY STATEMENT

The Bohack Corporation, debtor-in-possession, respondent, (hereinafter referred to as "Bohack") and its official Creditors' Committee jointly submit their opposition to the petition of Truck Drivers Local Union No. 807, I.B.T. (hereinafter referred to as "Local 807") that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, which unanimously affirmed the decision and order of the United States District Court for the Eastern District of New York (Mishler, Ch.J.) on the opinion below, which is reproduced at pp. 52a-98a of petitioner's appendix, 431 F. Supp. 646 (E.D.N.Y.). That order reviewed Bankruptcy Judge Parente's order with respect to arbitration pursuant to a collective bargaining agreement that had been rejected during the Chapter XI proceeding.

OPINION BELOW

On November 19, 1975, the United States District Court for the Eastern District of New York (Mishler, Ch.J.), rendered its decision from an order of the Bankruptcy Court for the Eastern District of New York (Parente, J.), which decision, in principal part, affirmed the Bankruptcy Court's decision to refuse to confirm an arbitration award of a Teamsters Grievance Committee entered in favor of Local 807 because the Bankruptcy Court had not authorized arbitration under the rejected collective bargaining agreement pursuant to Rule 919(b) of the Bankruptcy Act. The District Court, in accordance with Section 26 of the Bankruptcy Act, (11 U.S.C. 49), remanded to the Bankruptcy Court the "issue of the advisability of granting the debtor (Bohack) leave to arbitrate" (Resp. App. at 1a-10a).

The decision and order of the District Court was appealed by Local 807 to the United States Court of Appeals for the Second Circuit. The Court rendered its decision on August 9, 1976 (541 F.2d 312;* Pet. App. at 1a-42a). After a review of the decision of the District Court, the Second Circuit remanded three issues to be determined by the Bankruptcy Court:

> "(1) whether to affirm the contract, or whether the debtor has so conformed to the contract as to make it binding, See In re Public Ledger, Inc. 161 F. 2d 762, 767 (3d Cir. 1947), cited with approval in *REA Express, Inc., supra,* 543 F.2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Kevil Steel to "move cautiously in allowing rejection of a collective bargaining agreement," 519 F.2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues." 541 F.2d at 320-21.

While the case was sub judice in the Second Circuit, the Bankruptcy Court, on May 28, 1976 had entered

judgment in favor of Bohack, authorizing Bohack to reject its collective bargaining agreement with Local 807, as of July 19, 1975. (Pet. App. at 43a-44a).

Based on the remand of the Second Circuit, the Bankruptcy Court, after a hearing, issued an order on October 15, 1976 directing "arbitration in accordance with the procedures set forth in Section 26 of the Bankruptcy Act to determine if [Bohack] breached said collective bargaining agreement, and to render a finding on damages if necessary." (Pet. App. at 45a-46a).

On October 21, 1976 the Bankruptcy Court entered a second order (47a-51a) setting forth the following issues to be submitted to arbitration:

> a) The extent of damages to be recovered by the discharged employees upon the rejection of the labor contract between The Bohack Corporation and Truck Drivers Local Union No. 807 International Brotherhood of Teamsters.
>
> b) That amount and extent of pension, health, insurance, welfare, vacation benefits and the value of seniority of each employee effected [sic] by said rejection of the employment contract.
>
> c) The amount of the mitigation of such damages by reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.
>
> d) The issue of whether or not the contract rejected by the employer should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the contract has expired.

In addition, the Bankruptcy Court stated in its Order of October 21, 1976 that:

> ". . . all issues determined by the arbitrators be subject to the further order of this Court, as to the status, amount and the validity of such arbitrator's award . . ."

Both Bohack and Local 807 appealed to the District Court from the Bankruptcy Court's orders of October 15, 1976 and October 21, 1976. (Jt. App. 152a-155a). Bohack appealed on the ground that there should be no arbitration at all if, in fact, the rejection of the collective bargaining agreement on May 28, 1976 was proper. Local 807 appealed to the District Court on the issues of rejection of the collective bargaining agreement and whether the Bankruptcy Court could review arbitrable grievances.

The District Court (Mishler, Ch.J.) (431 F. Supp. 646, E.D.N.Y., 1977), after a lengthy review of the facts of the Chapter XI proceeding, affirmed the Bankruptcy Court's order granting Bohack judgment to reject its collective bargaining agreement with Local 807. Further, The District court vacated the October 15, 1976 order and affirmed the order of October 21, 1976 as to the first three issues stated in the Bankruptcy Court's order of October 21, 1976.

Local 807 appealed to the Second Circuit Court of Appeals, and in a per curiam decision (Pet. App. 99a-100a, 567 F.2d 237), the Second Circuit affirmed, on the opinion of the District Court.

ISSUES PRESENTED

1. Does rejection of an onerous and burdensome collective bargaining agreement between a debtor-in-possession and a union, pursuant to the Bankruptcy Act, moot all requirements for arbitration of alleged breaches of the rejected labor agreement.

2. If any arbitration is appropriate, is such arbitration governed by Section 26 and Rule 919(b) of the Bankruptcy Act?

3. Is consideration of that issue of sufficient public importance to warrant review by this Court?

STATEMENT OF FACTS

On July 30, 1974 Bohack filed its original petition pursuant to Chapter XI of the Bankruptcy Act and, by order entered on the same day was continued in operation and management of its business and property as debtor-in-possession. At the time of filing, Bohack had operated approximately 125 retail supermarkets in Brooklyn, Queens and Long Island, together with its warehouse and distribution facilities at Metropolitan Avenue in Brooklyn, New York (the "Terminal").

Local 807 represented all of the truck drivers employed by Bohack for over thirty years prior to the Chapter XI proceeding.

Local 807 drivers were laid off in various states. On December 16, 1974 sixty drivers were laid off as a result of the closing of one of Bohack's warehouses.

On December 16, 1974, Bohack began to terminate its operations at its warehouse at the Bohack Terminal Complex, Brooklyn, New York. Some of Local 807's members were discharged and Local 807 filed a grievance with the New York City Joint Local Grievance Committee in December and at that time the committee found the question was a jurisdictional dispute between Local 807 and another union whose drivers were delivering merchandise to Bohack stores from another supplier. Thereafter, however, the committee, on May 16, 1975, entered an award favorable to the union in effect prohibiting Bohack from receiving merchandise from other suppliers.

On May 27, 1975, Local 807 instituted a suit in the Supreme Court of the State of New York to confirm the arbitration award, which suit was removed to the District Court. On July 18, 1975, Bohack moved for rejection of the collective bargaining agreement pursuant to Section 313 of the Bankruptcy Act. (11 U.S.C. 713).

In January of 1975, additional drivers were laid off and in July of 1975, when Bohack terminated all its warehouse operations, the remaining thirty-two drivers were discharged. On July 18, 1975, the date of the last lay-off, Bohack moved to reject the labor contract with Local 807 pursuant to Section 313 of the Bankruptcy Act.

The rejection hearing was held in two parts, on November 17, 1975, and after an extended period of discovery by Local 807, on May 18, 1976. Joseph Binder, at the time of the November, 1975 hearing, was Executive Vice-President of Bohack, having been its President prior to the filing of the Chapter XI petition. (Unless otherwise indicated, all references to Binder's testimony in this Statement of Facts refer to the transcript of the November 17, 1975 hearing, which appeared in the joint appendix before the Court of Appeals.)

In January of 1974, Bohack had approximately 140 stores in operation, and just prior to the filing of the Chapter XI petition in July of 1974 there were approximately 125 stores in operation (176a). At one time in 1973 Bohack had over 200 stores. Those stores were supplied basically by the warehouses located at the terminal. There was a grocery warehouse, meat warehouse, dairy warehouse, produce warehouse, and delicatessen commisary (177a-178a). Local 807 drivers had delivered merchandise to the stores in a fleet of trucks that was owned by Truck Fleets of New York, Inc., a wholly owned subsidiary of Bohack (178a). Approximately fifty per cent of the 37 acres of terminal property was used for Bohack's warehouse and distribution operation, and Bohack paid approximately one and one half million dollars for the carrying charges, maintenance and taxes on that portion of the terminal (179a-180a).

At the time the Chapter XI petition was filed, Manufacturers Hanover Trust Company had a lien on all

of the property of Bohack, including inventory (180a). Shortly after the filing of the petition, the bank released its lien on inventory for the purpose of inducing merchandisers to ship to Bohack's warehouse with the security of a letter of credit at Manufacturers. (181a-182a). At that time the grocery warehouse, which comprised about 300,000 square feet, was rapidly being emptied and Bohack was attempting to get bulk loads of merchandise into the grocery warehouse in an attempt to keep it operating (182a). Notwithstanding these efforts, suppliers were not giving Bohack credit and Bohack was essentially on a C.O.D. basis (183a).

At the direction of the Creditors' Committee, Bohack started to sell its unprofitable stores, so that at the time of the hearing of November 1975, the company was down to seventy-two stores (184a). The first significant closings took place in about November of 1974, 90 days after the filing of the petition, which closings reduced the volume in the warehouse to the extent that the warehouse began losing money at a rapid pace, creating a negative cash flow, and preventing Bohack from purchasing the merchandise on a C.O.D. basis that it needed to keep the sale volume up (184a-185a). At that point the Creditors' Committee mandated Bohack to dispose of the Terminal (185a-186a).

As the warehouses were becoming more of a drain on the company, the Brooklyn Savings Bank, the lead bank in a consortium which held the first mortgage on the Terminal, threatened foreclosure proceedings because of Bohack's default in payment of the mortgage and taxes (186a).

In December of 1974, the produce and dairy warehouse operations were closed down, and a supply agreement was entered into with Shopwell, Inc., which acted as Bohack's wholesaler for produce and dairy

(187a). When it became apparent that no credit was forthcoming from grocery manufacturers, the grocery warehouse was closed down in January of 1975, and two grocery suppliers, Filigree Foods in New Jersey and Bozzuto's, Inc. in Connecticut, were used to supply groceries (187a-188a). Prior to that time the 807 drivers had been picking up groceries from Bozzuto's, bringing them to the terminal, where other 807 drivers would then deliver the groceries to the stores. At that point the grocery warehouse was "out of stock" in the neighborhood of fifty to sixty percent of the net items and the store shelves were depleted as a result (190a).

Binder testified that in order to run a warehouse a chain must have sufficient volume to justify such operation, the costs of which are astronomical, and as Bohack closed its stores, the volume depleted to the point that Bohack, at the time of the November 1975 hearing had become a regional chain rather than a general supermarket chain (192a-193a). Prior to the filing of the petition, Bohack's volume was approximately $300,000,000 a year. At the time of the 1975 hearing, the volume was no more than $165,000,000 (193a).

When the first warehouses (produce and dairy) were closed, Bohack negotiated with Shopwell with respect to the transportation of the merchandise to be purchased by Shopwell. Bohack requested that its drivers be allowed to pick up merchandise from Shopwell, but Shopwell flatly refused, indicating "they had enough problems without getting involved with another union" (194a).

The specific offer made by Binder was that the Local 807 drivers would go to Shopwell with Bohack equipment, have Shopwell employees load the trailers, and have the Bohack drivers take the trailers out of the Shopwell warehouse, but such offer was refused (195a).

At the time that the grocery warehouse was closed in

January of 1975, the Local 807 drivers were picking up groceries from both Filigree and Bozzuto's. The cost of that operation was substantially higher than what it would normally cost a wholesaler to deliver directly to the store, and the use of the warehouse was becoming more and more expensive (196a-197a). As a result, the agreement with Bozzuto's was modified so that Bozzuto's drivers delivered to the terminal and the Local 807 drivers delivered to the stores (197a).

In April of 1975, Filigree filed its own Chapter XI petition and stopped delivering to Bohack (198a). Bohack entered into an agreement with Krasdale, located in the Bronx, and Krasdale refused to allow Local 807 drivers to pick up the merchandise as had been done with Filigree (199a).

Bohack had no choice but to enter into the agreement with Krasdale for merchandise delivered directly to the store, because Filigree had cancelled deliveries without notice and no other supplier was available, as Associated Foods had also filed a Chapter XI proceeding at about the same time (199a). Met Foods would not ship because of its discomfort with Bohack's financial situation and there were no other suppliers to deal with. Continued lack of delivery would have resulted in the closing down of the chain as the shelves of the stores were virtually empty and volume was rapidly decreasing and customers being lost (200a-201a).

Thereafter, changes were made because of Shopwell's price structure, and various other suppliers were used. At the time of the November 1975 hearing, Bozzuto's was supplying groceries, Krasdale was supplying dairy, Hills Supermarkets was supplying meat, produce and delicatessen and Global Frozen Foods, Inc. was supplying frozen foods. Manufacturers Hanover Trust Co., in an effort to support Bohack's attempts at rehabilitation,

reduced its inventory lien and issued Letters of Credit in the amount of $1,500,000 which were given as security for the delivery from those companies (204a).

Subsequent to the commencement of the foreclosure proceedings on the terminal by the Brooklyn Savings Bank, corporate headquarters was moved to space over one of the Bohack stores in Little Neck, all warehouses were closed down and Bohack totally vacated the terminal except for some maintenance equipment and vehicles (205a).

Prior to the time of the filing of the petition Bohack, through Truck Fleets of New York, owned 236 pieces of trucking equipment (205a). At the time of the November, 1975 hearing, 64 pieces of equipment were being rented to Hills for the purpose of delivering produce, meat and delicatessen to Bohack stores by Hills, and 79 pieces were up for auction (206a). The others had been disposed of.

The rental payment on the trucks leased to Hills was the amount necessary for Bohack to pay off the notes on which Bohack was the guarantor to the manufacturers of the equipment (207a). At the time of the change-over to Hills, Mr. Binder asked Hills to use Bohack drivers to make the deliveries but was told by Hills that they had their own union problems and they would not allow Bohack drivers to make the deliveries (208a-209a). Bohack introduced exhibits at the November 1975 hearing (461a-463a) which tabulated the proposed savings by the elimination of the trucking and warehouse operations (216a-222a) which would result from the elimination of the contract directly, there would be an additional savings of between $700,000.00 to $1,000,000.00 that was currently being lost by the operation of the terminal by Bohack (223a-229a) so that the total anticipated yearly savings by closing down the warehouse and trucking operation would be approximately $2,000,000 (229a). Mr. Binder

specifically testified that the warehouse and trucking operation was one operation that could not be separated (227a). The requests to the new suppliers to separate their operations so that Local 807 drivers would be able to deliver the merchandise to the Bohack stores were rejected by the suppliers (227a).

Mr. Binder further testified that a Plan of Arrangement was feasible but only if Bohack could operate as a retail chain, and buy from wholesalers operating by direct delivery to the stores; and that no Plan of Arrangement could be put together if Bohack were required to continue the warehouse and trucking operation (236a-237a).

Bohack was having severe financial difficulties because, apart from other inherent Chapter XI losses, it was not able to purchase the $2,500,000.00 of merchandise per week it had to have in order to maintain its then current weekly sales volume of $3,200,000.00 (232a).

Based on these uncontroverted facts, while the arbitration issue was pending before the Second Circuit, the Bankruptcy Court granted Bohack's application to reject the collective bargaining agreement because it was onerous and burdensome. That remand resulted in the two orders of the Bankruptcy Court referred to above.

REASONS FOR REFUSING TO GRANT LOCAL 807's WRIT

I

THE REJECTION OF THE LABOR CONTRACT AND TERMINATION OF ALL OPERATIONS BY THE DEBTOR, REQUIRES THAT ANY ARBITRATION BE CONDUCTED UNDER THE PROVISIONS OF THE BANKRUPTCY ACT.

In its 1976 remand to the Bankruptcy Court, the Court of Appeals merely directed it to determine whether there were arbitrable issues, and did not define any issues or, in fact, state that such issues existed. However, the Bankruptcy Court perceived the remand as direction by the Second Circuit to allow the arbitration and to subject any award arising therefrom to the scrutiny of the Bankruptcy Court. The ambiguity of the Second Circuit's opinion has, we submit, been resolved by *Allegaert v. Perot,* et al, 548 F.2d 432 (2d Cir., 1977).

It is Bohack's position that the contract was properly rejected on the uncontroverted facts presented before the Bankruptcy Court and, in the event that any claim for damages or any administrative claim that Local 807 might have, will be subject to the Bankruptcy Court's application of Section 64 of the Bankruptcy Act, which determines the priority of claims. If an arbitrator decides that there was a breach of contract, it would vitiate the uncontroverted findings of the Bankruptcy Court that there was a proper rejection. In *Local 455 v. Kevin Steel Products, Inc.,* 519 F.2d 698 (2d Cir., 1975); *Brotherhood of Railway, Airline and Steamship Clerks, etc. v. R.E.A. Express, Inc.,* 523 F.2d 164 (2d Cir., 1975), cert. den. 423 S.Ct. 1017, and *Local 807 v. Bohack,* 541 F.2d 12 (2d Cir.,

1976), the Second Circuit addressed the question of policy conflicts that exist between the Bankruptcy Act and the National Labor Relations Act. The result sought to be reviewed here is consistent with that series of cases. See *American Safety Equipment Corp. v. J.P. McGuire & Co.,* 391 F.2d 821 (2d Cir., 1968); *Wilko v. Swan,* 346 U.S. 427 (1953); cf. *L.O. Koven & Brother, Inc. v. Local U. No. 5767, United Steelworkers,* 381 F.2d 196 (3d Cir., 1967).

As the Third Circuit said in *Koven, supra,* at p. 205:

> "In summary, we hold that questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should be feasible be decided by the arbitrator, unless they involve special bankruptcy interests. If such interests are present, then the proper forum should be dictated by the needs of the particular case, and this is a matter best left with the discretion of the trial court. We find that no such interests are involved in the release issue, and hold therefore that it is arbitrable."

In this case, special bankruptcy interests are obviously present, and there is direct potential conflict involved in an arbitrator's finding that the contract was "breached" when the Bankruptcy Court has already found it was properly rejected, which rejection is as of July 30, 1974 as a matter of law, which decision was affirmed by the District Court and the Second Circuit.

As the Second Circuit recognized throughout its opinion in *Local 807 v. Bohack, supra,* a rejection is effective as of the date of the filing of the Chapter XI petition. There is ample opportunity in the Bankruptcy Court for Local 807 to be heard on the issue of their alleged damages which opportunity arises from their filing of claim number 2288, alleging a priority administration claim based on the alleged breach of contract. The Second

Circuit recognized implicitly in the *Kevin Steel* case that the rejection of an agreement would, in effect, moot many issues as to alleged breaches during the period of time after the filing of the petition. Thus, in *Kevin Steel,* the National Labor Relations Board had found violations of the National Labor Relations Act and had required the company to execute a contract submitted by the union and give it retroactive effect, as well as requiring the company to "make the employees whole for any loss of wages or other benefits suffered as a result of its failure to sign the agreement as to offer reinstatement to the unlawfully discharged employees." There the N.L.R.B. conceded that the effect of the enforcement of the Board's order remedying the violations was dependent upon the outcome of the company's application to reject the agreement (519 F.2d at p. 701).

It is respectfully submitted that here, as in that case, the rejection properly moots any potential award of specific performance that may be made by an arbitrator. Thus, were specific performance of a rejected contract is possible, and Section 64 of the Bankruptcy Act provides the appropriate means for determining any question of damages alleged by the union, the rejection of the contract eliminates any need or desirability for an arbitration hearing in which the ultimate questions of damages allegedly sustained must be reviewed by the Bankruptcy Court in any event.

II

AS A MATTER OF LAW, BOHACK DID NOT ASSUME, EITHER EXPRESSLY OR IMPLIEDLY THE AGREEMENT THAT WAS REJECTED.

Recognizing the right of Bohack to reject executory contracts, Local 807 argues that Bohack either expressly assumed or implicitly adopted the terms of the rejected collective bargaining agreement. We respectfully submit that, as a matter of law, no such assumption or adoption is possible without the explicit waiver of the right to reject in a Chapter XI proceeding.

The union's claim is essentially grounded in the holding of *In re Public Ledger, Inc.,* 161 F.2d 762 (3rd Cir., 1947) which was a Chapter X case and dealt with the implied assumption of the contract by the trustees in bankruptcy. The Court of Appeals noted there that the Bankruptcy Court clearly contemplated a quick reorganization and "continuance of the labor contract as the basis for the continued service of the employees," and thereby authorized the trustees to assume the contract (161 F.2d at 767).

In a Chapter XI proceeding, the debtor-in-possession may reject an executory contract under Section 313(1) of the Bankruptcy Act, Rule XI-53, or pursuant to Section 357(2), in the Plan of Arrangement itself. (11 U.S.C. 711 and 757).

It is our position that the inescapable conclusion to be drawn from that statutory scheme is that unless there is an explicit assumption of the contract or such action that would mislead the other party to the contract, a debtor-in-possession may not be charged with the assumption of the contract under the circumstances presented here. *The Bohack Corporation v. Staltac Associates, et al.,*

__F.Supp.__, 2 Bankr. Ct. Dec. 396 (E.D.N.Y., 1976), *Smith v. Hill,* 317 F.2d 539 (9th Cir., 1963); 8 *Collier on Bankruptcy,* 14th ed., ¶313(1) [6] at 204.

On one hand this union argues most strenuously that Bohack's actions since the filing of the original petition, pursuant to Chapter XI, constitute an express or implied assumption of the agreement; on the other hand it argues that Bohack's actions with respect to the agreement, since the filing of the petition, are the basis of a claim for breach of that contract subject to an arbitration award by an appropriate panel as set forth in the collective bargaining agreement. It is respectfully submitted that 807 cannot interpret the same facts so as to reach opposite conclusions simultaneously.

The very fact that a Plan of Arrangement, pursuant to Section 357(2) of the Bankruptcy Act, may provide for the rejection of any executory contract, is, we submit, ample grounds for holding that a debtor-in-possession has almost unlimited discretion as to when it may reject such a contract. See *The Bohack Corporation v. Stalac Associates, et al, supra.* There is an express distinction between a Chapter XI proceeding and straight bankruptcies under the Bankruptcy Act, in that a trustee in bankruptcy is expressly allowed sixty (60) days in which to either affirm or reject a contract unless that time is extended by the court under Section 70b of the Bankruptcy Act (11 U.S.C. 110b), and there is no time limit set in which a debtor-in-possession may take similar action. As indicated above, the two sections dealing with Chapter XI proceedings give a debtor-in-possession much more latitude in time to decide when in fact to reject the contract. In fact, under the new provisions dealing with Chapter X cases, the trustee has the same rights as a debtor in Chapter XI proceedings to reject executory contracts in a Plan of Reorganization. Bankruptcy Act,

§216, 11 U.S.C. 616. The facts in this case clearly indicate that there never was an assumption of the contract.

The Chapter XI proceeding has been pending since July 30, 1974, and during that period of time there have been constantly changing circumstances which have made it appropriate for Bohack to seek rejection of contracts under which it previously operated. Obviously, one of the most important circumstances governing collective bargaining agreements is the nature of the Bohack operation as a supermarket chain.

Both the size and scope of Bohack's operation were radically altered during the period of July 30, 1974 to July 18, 1975. During the period, the retail outlets of Bohack were reduced from approximately 140 to approximately 70. The warehouse and trucking operation which revolve around the terminal at Bohack Square were totally terminated, by virtue of Bohack's moving out of Bohack Square.

Each time a portion of the warehouse and trucking operation was discontinued, Bohack discharged Local 807 drivers by seeking accomodations to that effect with the various suppliers, but was unsuccessful in each instance. Of course, during that period of time it continued to pay each driver who remained in Bohack's employ the wages and fringe benefits he was making according to the terms of the collective bargaining agreement. The correct findings of fact in this regard by the Bankruptcy Court have twice been affirmed.

Section 357(2) of the Bankruptcy Act (11 U.S.C. 757(2)), in allowing rejection of executory contracts in a Plan of Arrangement contemplates the precise situation present here, where the debtor is a large corporation whose rehabilitation proceedings take an extensive period of time, and whose actions are subject to changing circumstances. *Bohack v. Staltac, supra; In re Miracle*

Mart, Inc., 396 F.2d 62 (2d Cir., 1968). There is no time limit contained in Sections 313(1) and 357(2) of the Act, and, indeed, the time within which a debtor may file an amended Plan of Arrangement is subject only to the equity jurisdiction of the Bankruptcy Court.

The Bankruptcy Court, as a court of equity, properly found that Bohack did not assume or adopt the contract by retaining as many of the 807 drivers as it could during each stage of the reduction in operations. *Brotherhood of Railroad, Airline and Steamship Clerks v. R.E.A. Express, Inc., supra.*

The District Court, upon review of the record before it, found that the Bankruptcy Court's decision was not an abuse of its discretion, and was proper and supported by the uncontroverted evidence. Bankruptcy Act, Section 2a(10) (11 U.S.C. 11); Bankruptcy Rule 810; *Kolesinski v. Mashey,* 127 F.2d 528 (2d Cir., 1942); *Morris Plan Industrial Bank v. Henderson,* 131 F.2d 975 (2d Cir. 1942); *In re Ira Haupt & Co.*, 289 F. Supp. 966 (S.D.N.Y., 1968); *In the Matter of Scientific Resources Corporation,* I Bankr. Ct. Dec. 689 (E.D. Pa., 1975); 2A *Collier on Bankruptcy,* 14th Ed. ¶39.28; 13 *Collier on Bankruptcy,* 14th ed., ¶810.01 et seq.

III

THERE ARE NO ISSUES OF SIGNIFICANT PUBLIC IMPORTANCE TO WARRANT REVIEW BY THIS COURT

There are inevitably conflicts between various Federal policies as expressed in the statutes regulating areas of economic activity. The conflict between labor and bankruptcy policies is more apparent than real in this case. Petitioner has attempted to persuade this Court that the Second Circuit's opinions, permitting rejection of collective bargaining agreements, represents a departure from previous rules of law. In fact, these decisions are the only ones to interpret the new Bankruptcy Act. There is certainly no conflict with other circuits in respect of a Chapter XI debtor's right to reject contracts at any stage of a Chapter XI proceeding.

Moreover, the Bohack decision is not in conflict with the policy of arbitration, because what petitioner seeks is arbitration of a dispute, and specific enforcement of an award under a contract that has both expired and been rejected. Certainly, no consideration of stability in labor-management relations is present in such circumstances. The Second Circuit's opinions have set appropriate groundrules to insure that the Chapter XI proceedings will not be used as a cloak to legitimize an employer's getting rid of a union. In this case, Bohack's actions came squarely within those guidelines. There is no point in attempting to arbitrate a dispute under the dead contract at this point, and this Court is not faced with any important policy considerations, as none are inherent in such an attempt. Petitioner has the right to present its damage claim in the Bankruptcy proceedings. Given that forum, it does not have the right to insist that this Court

give it its choice of forums by compelling arbitration before a Teamsters Grievance Committee without review by the appropriate Courts, whose statutory authority is over all of the property and affairs of the debtor. Section 311 of the Bankruptcy Act (11 U.S.C. 711).

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION OF LOCAL 807 FOR THE ISSUANCE OF A WRIT OF CERTIORARI BE DENIED

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-B; 75-C-905; 75-C1191

TRUCK DRIVERS LOCAL UNION 807, etc.,
Plaintiff,

-against-

THE BOHACK CORPORATION,
Defendant.

In the Matter of the
BOHACK CORPORATION,
Debtor.

Memorandum of Decision and Order
November 19, 1975

MISHLER, CH. J.

A number of issues arising out of the decision of the Bohack Corporation (Bohack) to discontinue its warehouse and distribution terminal and terminate the employment of its drivers, members of Truck Drivers Union Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), are presented to this court.

Bohack operates a chain of retail supermarkets throughout Brooklyn, Queens, Nassau, and Suffolk Counties. On July 30, 1974, Bohack filed a petition for arrangement under Chapter XI of the Bankruptcy Act. At the time of filing of the petition, Bohack had approximately 150 drivers. Bohack was and is in contractual relation with the Union under a labor agreement commencing on July 1, 1973 and expiring on March 31, 1976. The Union has represented Bohack's truck drivers for more than thirty years.

Elimination of the warehouse would result in a net saving of over $500,000. The proposed plan of arrangement provided for a discontinuance of the warehouse and the termination of employment of its drivers. in approximately November, 1974, it started to purchase some of its merchandise directly from wholesale grocers. Some drivers were retained under arrangements where Bohack drivers picked the merchandise up at the vendor's place of business, and meat and meat products continued to be delivered from the warehouse until July, 1975. Some jobs were terminated in December, 1974, and all employment of the Union's 32 truck drivers terminated in July, 1975.

The labor agreement is in two parts: the National Master Freight Agreement (Master Agreement) and a Supplemental Agreement covering the New York-New Jersey area.

Article 8, Section 1(a) of the Master Agreement provides that "All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement (or factual grievances under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement."

Section 1(b) of Article 8 provides that:

> "Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement shall be submitted to a permanent National Grievance Committee. . . ."

The Supplemental Agreement recognizes the authority of the National Grievance Committee to pass on the issue of interpretation of the contract (Article 45, Section 8). Article 46, Section 1(a), establishes the authority of the Joint Local Committee to determine disputes over the discharge of an employee.

On December 16, 1974, the Union served notice of arbitration before the New York City Joint Area Local Committee of the issue involving the subcontracting provision of the Master Agreement (Article 32).[1]

The position of the Union as stated in its notice of arbitration is that

> "As of December 16, 1974, the Bohack Corporation is using employees of Daitch Shopwell to deliver dairy and bakery products from a Daitch Shopwell warehouse to Bohack stores with equipment owned by Fleet Services of New York, Inc., a wholly owned subsidiary of The Bohack Corporation."

The Joint Local Committee viewed the dispute as a jurisdictional dispute between the Union and locals whose members were employed by the wholesale grocers and were delivering merchandise to Bohack, and referred the matter to the Joint Council as an inter-local union dispute.

On May 12, 1975, the parties appeared before the Joint Local Committee.[2] The Joint Local Committee,

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[1] Article 32 is a covenant by the employer not to contract or assign work . . . "of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit. . . ."

[2] Bohack claims it appeared without counsel to challenge the jurisdiction of the Joint Local Committee. The Union claims that Bohack ". . . argued the merits of their dispute."

noting that the parties appeared and testified, held that Bohack "is in violation of Article 32," and ordered Bohack to ". . . cease and desist, forthwith, from having its bargaining unit work subcontracted out which is violative of said Article."

On May 27, 1975, the Union instituted a proceeding for confirmation of the arbitration award in New York State Supreme Court, Queens County. That proceeding was removed to this court on Bohack's petition.

The Union was advised that Bohack did not intend to abide by the terms of the arbitration. On June 30, 1975, the Union placed picket lines at Bohack's terminal and sixteen of its retail supermarkets. On the same day, Bohack made application for a temporary restraining order before Bankruptcy Judge Parente. After an evidentiary hearing, Judge Parente made the following findings:

> (1) That arbitration was not authorized as required by section 26 of the Bankruptcy Act (11 U.S.C. §49), and that the arbitration award was null and void and of no effect;
>
> (2) That if the strike continued, Bohack would suffer irreparable harm; and
>
> (3) That the Union had agreed not to strike under the circumstances.

On June 30, 1975, at the conclusion of the hearing Judge Parente signed a temporary restraining order restraining the Union from picketing.

On July 16, 1975, Judge Parente signed an order enjoining the Union from picketing or striking "during the pendency of this action."

On July 18, 1975, Judge Parente signed an order directing the Union to show cause why Bohack should not be permitted to reject the labor contract. The motion was returnable on July 25, 1975. The hearing was adjourned by stipulation to await the decision of the Court of Appeals in *Shopmen's Local Union No. 455, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc.*[3]

Proceedings Pending in this Court

(1) The proceeding to confirm the arbitration award (removed from New York Supreme Court, Queens County);

(2) An action by the Union pursuant to Section 301(a) of N.L.R.A., 29 U.S.C. §185(a), to compel Bohack " . . . to specifically perform its collective bargaining agreement with plaintiff and to submit any grievances between them to the grievance procedure;"[4] and

(3) An appeal from Judge Parente's order dated July 16, 1975, enjoining the Union from striking or picketing.

Lack of Authority to Arbitrate Labor Disputes

Bohack challenges the validity of the arbitration award on the ground that as debtor in possession, it lacked authority to proceed to arbitration without permission of the court. Section 26(a) of the Bankruptcy Act, 11 U.S.C. §49(a).[5] The Union, relying on *Tobin v. Plein,* 301 F.2d

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[3]519 F.2d 698 (2d Cir. 1975). The Union moved to stay the hearing on the petition to reject the labor contract. The motion was resolved by stipulation to continue the hearing if appropriate under *Kevin Steel*. The court directed the hearing to proceed in the Bankruptcy Court.

[4]The complaint claims violation of the covenant against subcontracting, the validity of the arbityration award, and the invalidity of the preliminary injunction order. Bohack's answer incorporates a counterclaim seeking arbitration upon authorization of the Bankruptcy Court pursuant to Rule 919(b) of the Bankruptcy Rules (formerly section 26 of the Bankruptcy Act, 11 U.S.C. §49).

[5]Section 26(a) provides:

> The receiver of trustee may, pursuant to the direction of the

378 (2d Cir. 1962) argues that such authorization is unnecessary where as here the labor contract executed prior to the filing of the petition, contained the grievance procedure and arbitration clause.[6]

The court finds that reliance on *Tobin v. Plein* is misplaced for there authorization was sought by the trustee and granted, and the issue before the court was whether the arbitration machinery provided by contract or by the general order should be employed.

In re Muskegon Motor Specialties Company, 313 F.2d 841 (6th Cir. 1963), presented the court with the issue presented here.[7] The court found that the rights of the

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court, submit to arbitration any controversy arising in the settlement of the estate.

Bankruptcy Rule 919(b) which supersedes section 26(a) provides:

> On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

[6]In *Tobin v. Plein, supra,* the trustee made application to arbitrate a dispute which occurred before the filing of the petition pursuant to an arbitration clause in the contract out of which the dispute arose. The trustee moved to vacate the order of authorization claiming the contract was rejected by his failure to affirm within 60 days as provided in section 70(b) of the Bankruptcy Act, 11 U.S.C. §110(b). The trustee argued that arbitration in any event must be conducted under the procedures sete forth under General Order 33. The court said at page 381:

> These provisions specify the procedure to be followed for the arbitration of controversies arising in the settlement of the estate. But this section is clearly drawn to provide arbitration machinery where no contractual arrangements exist. It does not supersede explicit contractual provisions.

[7] In *Muskegon*, a division of the debtor went out of business and terminated the employees of the division. The union brought an action in the district court to compel arbitration. Subsequent to filing the suit, Muskegon filed a petition under Chapter XI of the Bankruptcy Act (converted to a Chapter X proceeding). The union argued, as does

employees were fixed and a question of law remained which could better be passed on by the court (at page 843). The court said:

> The reorganization court had "exclusive jurisdiction of the debtor and its property wherever located." 11 U.S.C. §511 . . . [T]he court had all the powers of a bankruptcy court . . . and of a court of equity. 11 U.S.C. §§514, 516 . . . The bankruptcy court does not ordinarily surrender its jurisdiction except under exceptional circumstances. *Magnus v. Miller,* 317 U.S. 178, 186, 63 S.Ct. 182, 87 L.Ed. 169. Whether the bankruptcy court should surrender its jurisdiction to another tribunal involved the exercise of judicial discretion. *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483, 60 S.Ct. 628, 84 L.Ed. 876. 313 F.2d at 842.

In *Johnson v. England,*[8] 356 F.2d 44 (9th Cir. 1966), the court in denying arbitration under a labor agreement held:

> A decision of an arbitrator here would involve interests of parties who never consented to arbitration, namely, the trustee in bankruptcy and the general creditors. They ought not to be bound by the decision of an arbitrator selected by the employer and union. The issues here are within the special competence of a bankruptcy court. 356 F.2d at 51.

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the Union here, that federal policy favored arbitration of labor disputes, *United Steel Workers of America v. American Manufacturing Co.,* 363 U.S. 564, 80 S.Ct. 1343 (1960), *United Steel Workers of America v. Enterprize Wheel and Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358 (1960), *United Steel Workers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347 (1960).

[8]In *Johnson v. England, supra,* the union commenced a proceeding in the state court to compel arbitration of a labor dispute. Subsequently, the employer filed a voluntary petition in bankruptcy. The arbitration proceeding was removed to the district court. The court pointed out that the employer had ceased to do business.

The teaching in *Kevin Steel*[9] is instructive. The court found no irreconcilable conflict between the policy of the Bankruptcy Act in preserving the funds of the debtor and to give the debtor a new start on the one hand, and that of the National Labor Relations Act encouraging the creation and enforcement of collective bargaining agreements (519 F.2d at p. 706). This court finds no irreconcilable conflict between the Bankruptcy Act and the strong federal policy favoring the arbitration of labor disputes.

The Bankruptcy Judge should first pass on the advisability of retaining jurisdiction of a dispute affecting the proceeding before him. Rule 919(b) requires authorization of the Bankruptcy Court regarding the resolution of claims affecting the estate.. Upon filing of the petition Bohack became a new entity "with its own rights and duties subject to the supervision of the bankruptcy court. . . . Until the debtor . . . assumes the old agreement or makes a new one it is not a "party" under section 8(d) to any labor agreement with the union . . ." *Kevin Steel*, 519 F.2d at 704.

The motion to confirm the award of the Joint Local Committee[10] is denied.

JURISDICTION OF THE BANKRUPTCY COURT OVER LABOR DISPUTES

The National Labor Relations Act was a comprehensive plan of the Congress designed to promote

[9] The same result was reached by another panel of the Second Circuit Court of Appeals in *Brotherhood of Railway, Airline and Steamship Clerks et al. v. REA Express et al., Nos. 75-5007 and 75-5008 (2d Cir. Aug. 27, 1975).*

[10] It is apparent that the grievance as presented to the Joint Local Committee was a matter outside its jurisdiction and the proceedings upon which it was based, a nullity.

industrial peace through voluntary collective bargaining agreements, *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903 (1967). The Congress granted the National Labor Relations Board (Board) primary and exclusive jurisdiction over claims of unfair labor practices. *International Brotherhood of Boilermakers, etc. v. Hardeman,* 401 U.S. 233, 91 S.Ct. 609 (1971), *Carpenters District Council etc. v. United Contractors Ass'n of Ohio,* 484 F.2d 119 (6 Cir. 1973). The Union's claim was both an allegation of a breach of the labor agreement (Article 32) subject to determination under the appropriate grievance and arbitration procedure and of an unfair labor practice (29 U.S.C. §158((e)) of which the Board has primary and exclusive jurisdiction. The Supreme Court said in *N.L.R.B. v. Strong,* 393 U.S. 357, 89 S.Ct. 541 (1969):

> . . . [T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." §10(a), 61 Stat., 146, 29 U.S.C. §160(a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of contract are overlapping, concurrent regimes, neither pre-empting the other (citations omitted). Arbitrators and the courts are still the principal sources of contract interpretation (footnote omitted), but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts (citation omitted). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining agreement (citation omitted). 393 U.S. at 3670-61, 89 S.Ct. 541, 544-45.

The role of the court is to preserve the status quo in a matter before the Board if the officer or regional attorney "has reasonable cause to believe the charge is true and that a complaint should issue . . .," Section 10(1) of the Act, 29 U.S.C. §160(1), or compel arbitration if the issue

is arbitrable under the agreement or otherwise require specific performance of the agreement. Section 301(a) of the Act, 11 U.S.C. §185(a). Jurisdiction to grant injunctive relief is solely in the district court.

The Bankruptcy Court does not have jurisdiction over labor disputes. The preliminary injunction order of July 16, 1975, is reversed.

SUMMARY

It is ORDERED

(1) The preliminary injunction order is vacated.[11]

(2) The petition (in the form of an affidavit) to confirm the arbitrator's award is dismissed (Docket No. 75-C-905). The Clerk is directed to enter judgment in favor of Bohack and against the Union dismissing the petition.

(3) The issue of the advisability of granting the debtor leave to arbitrate is remanded to the Bankruptcy Court for proceedings consistent with this opinion.

s/Jacob G. Mischler
U.S.D.J.

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[11]This court will hear Bohack's motion for a preliminary injunction made under docket no. 75-C-1191 on November 26, 1975 at 10:00 a.m. The court has this day signed a temporary restraining order pending determination of that motion.